IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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CHARLES ELMORE CROPLEY

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Before proceeding to the consideration of the legal argument, respondent's counsel desire to point out and deal with certain matters in the petition and brief for petitioners that are either inaccurate or do not do full justice to the parts of the record in the Court below.

They are as follows:

1. On page 2 of the petition the statement is made that "The editorials dealt with law enforcement gen-

erally and mentioned three cases that had been disposed of by the court."

a) The part of the foregoing statement containing the words "that had been disposed of by the court," is inaccurate in that one of the three cases referred to was in reality eight indictments for rape, all of which were defective in that they did not contain the name of the person raped. The motions to quash were granted, but the prosecutions were not ended, the defendants being remanded to the custody of the sheriff for re-indictment, which subsequently occurred, the defendants being held in custody in the meantime.

While we are on this subject it may be well to point out to the Court a statement in the brief for the petitioners here in which on page 16 it is asserted that "The record is indisputable that none of the cases discussed in the editorials was pending before the Court at the time the editorials were printed." Upon the basis of this last statement, it is contended that "The refusal of the Florida Supreme Court to recognize these facts and reverse the judgment on appeal was arbitrary and capricious." As to a similar contention in the lower court Justice Terrell (R. 161) in exact accord with the facts made the following finding:

"The first paragraph of the fourth section then proceeds to illustrate the charge made in the third section by charging that Judge Paul D. Barns at the behest of the defendant peremptorily sent eight indictments for rape back to the grand jury for re-presentation and re-indictment because they were not properly drawn. The facts were that when the first of the eight rape cases was called the court was confronted with a motion to quash the indictment; on consideration of the motion *the prosecuting attorney agreed with the court that the indictment was defective because of failure to name the person raped and that the other seven were infected with a similar defect.* The grand jury was in session and Judge Barns promptly referred all the indictments back to the grand jury by which they were reconsidered

and new indictments were returned within twenty-four hours."

RAPE CASES—pending

Indictments in the eight rape cases had been quashed on October 30, 1944 (R. 137) and on October 31, 1944, new indictments were returned, defendants arraigned and their cases set for trial (R. 139; 141; 142), and this the petitioners knew on November 2, the date of publishing the editorial. The note on page 9 of petition, par. 4 referring to matters not of record states that the Miami Herald on November 1 published that they had been reindicted and arraigned for trial.

BROOK CLUB AND TEEPEE CLUB CASES—pending

The Brook Club case was dismissed on October 31, 1944 (R. 126) and it was within the power of the Court to reinstate it.

The Teepee Club case was pending and awaiting final termination, the last order entered being one denying motion of State's Attorney to set aside order of October 12, 1944, denying temporary injunction (R. 98).

2. On page 20 of their brief petitioners' counsel makes the following statement: "The citation didn't even allege that the comments of petitioners created any clear and present danger of high imminence to the administration of justice."

This statement is so adroitly constructed as to put forward a complaint of the absence of a conclusion, and at the same time to ignore the accompanying facts, and their unmistakable import.

On page 7 of the petitioners' brief they repeat the foregoing statement in the following form:

> "No allegation is to be found anywhere in the citation that either of the editorials or the cartoon created a clear and present danger of high imminence to the fair and impartial administration of justice in pending cases before either of the judges signing the citation."

On page 8 they record the fact that in their answer to the citation they "denied that the editorials and cartoon created a clear and present danger to the orderly administration of justice in the court."

This attempt to confine the consideration of the citation to the allegation of tendency, and to ignore the factual basis of the judges' action which are not denied, should not be indulged for the reason that it is essential to ascertain from the facts just what sort of a tendency it was, and what should be implied from the facts creating it.

Webster defines "tendency" as "A presumptive course of future change in continuation of observed phenomena." Let us see what the observed phenomena before us entitled us to presume.

In addition to the allegation of "tendency" we find the editorial of November 2, 1944 (R. 153) and the accompanying cartoon (R. 8A), and the editorial of November 7, 1944 (R. 157) which taken together constitute an attack so untruthful and defamatory as to compel the presumption that a clear and present danger of high imminence to the fair and impartial administration of justice, not only followed but immediately ensued.

To ignore these basic facts is no more logical than a contention that a person charged with murder did not commit the crime, he did but press his finger to the trigger of the pistol.

To follow this contention of the failure to place in the citation such words would exact of pleadings an exactness in respect to legal conclusions which is not required.

3. Before passing to the argument there is one further statement we wish to make, and that is that the part of the editorial containing what might be called the gravamen of the offence (R. 2) reads as follows:

> "Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to

find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.

"'[fol. 5] The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.'"

This matter when read in connection with Sec. 776.03, Florida Statutes, 1941, which reads as follows:

"*Accessory after fact:*—Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he has committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial, or punishment, shall be deemed an accessory after the fact, and be punished by imprisonment in the state prison not exceeding seven years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars.'"

charges the judges with being accessories after the fact to all of the crimes that the record shows were charged in the indictments before the court.

Lower Court's Holdings—Generally

Petitioners contending that the editorials and cartoon as applied to the facts did not constitute contempt submitted that:

"The publications upon which citation was based constituted legitimate criticism and comment within the

guaranties of Section 13 of the Declaration of Rights of the Constitution of Florida" (Petition p. 7).

to which the Supreme Court of Florida replied:

> "The law in Florida permits the most liberal exercise possible of freedom of the press but holds to account those who abuse it" (R. 171).
>
> *Penneckamp* v. *State*, 22 So. 2nd (text) 886.

that:

> "The publications upon which said citation was based constituted legitimate criticism and comment within the guaranties of the First and the Fourteenth Amendments to the Constitution of the United States" (Pet. p. 7).

to which contention the Supreme Court of Florida replied in effect:

> "'Freedom of the press' does not protect newspaper publisher if he chooses to lie about the court in his newspaper articles, and court is not helpless to do anything unless publisher lies in court room or his lying is manifested with such a high degree of imminence as to express a high degree of threat. F. S. A. Const. Declaration of Rights, sec. 11, 13; U. S. C. A. Const. Amends. 1, 6, 14:"
>
> *Penckamp* v. *State*, h. #21, 22 So. 2nd (text) 877.

that:

> "The publications complained of created no clear and present danger to the administration of justice" (Pet. p. 8).

to which contention the Supreme Court of Florida replied in effect:

> "Even if rule of 'clear and present danger' enunciated by United States Supreme Court in determining right to abridge freedom of the press is rule in state courts,

such courts are authorized to apply the rule by their own law and standards, and unless the application is shown to be arbitrary the state court's judgment should not be disturbed. F. S. A. Const. Declaration of Rights, sec. 11, 13; U. S. C. A. Const. Amends. 1, 6, 14."

Pennekamp v. *State*, hn. #23, 22 So. (text) 877.

"Editorials and a cartoon based on inaccurate, distorted, incomplete and biased reports of pending litigation, which imputed partisanship to circuit judges in favor of persons charged with crime which partisanship was stated to be so pronounced that judges refused to heed voice of the people's representatives, authorized conviction of publishers for contempt of court, and such judgment was free from error where it was not charged that it was obtained or applied in an arbitrary or unreasonable manner. F. S. A. Const. Declaration of Rights, sec. 11, 13; F. S. A. sec. 38.22, 28.23, 932.03; U. S. C. A. Const. Amends. 1, 6, 14." Hn. #24 (ibid).

Statement of Matters Involved

The editorial (R. 6) dealt with the action of the trial Court concerning what has been referred to in the citation (R. 1) and throughout the proceedings as the (A) Rape cases (R. 2; 134), the (B) Brook Club case #84054 (R. 3; 135), and the (C) Teepee Club case #87365 (R. 5; 136). Concerning these proceedings the Florida Supreme Court stated:

"The record was available in all these cases and it does not reveal a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges. It is shown rather that they acted in good faith and handled each case to the very best advantage possible. There was no judgment that could have been entered in any of them except the one that was entered. If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deduced and

there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment" (R. 162).

Pennekamp v. *State*, 22 So. 2d (text) 882.

Applying the editorial to the above mentioned cases, the Supreme Court of Florida stated:

"The cartoon and the editorials assimilated, the deduction is inescapable that the circuit judges of Dade County are grabbing at technicalities to free criminals, that the voice of the people is thrown to the discard, that trials are juggled at the behest of the criminal, that the courts are in league with the underworld and will sanction any species of sham plea to give it the breaks. We can think of no better build-up on which the cerebral plummet could fathom a state of partisanship and unfairness more libelous to the court. Appellants contend that no such interpretation was intended but the answer to this contention is that a 'man reveals his mind by the symbols he adopts' and we find no reason to conclude that appellants did not adopt their symbols deliberately" (R. 163).

Pennekamp v. *State*, 22 So. 2d (Text) 883.

The citation dealt with these several cases identified and classified (A) Rape Cases, (B) Brook Club Case and (C) Teepee Club Case in the order in which they were dealt with by the editorial. So has the Supreme Court of Florida. Petitioners have confused the order of arrangement and dealt with them as follows: (B) Brook Club Case (R. 3), (C) Teepee Club Case (R. 4) and (A) Rape Cases (R. 5).

ARGUMENT

The six questions presented to the Supreme Court of Florida have dwindled to three, which are as follows:

> "The decision of the Supreme Court of Florida in this cause is in conflict with the decision of this Court in Bridges v. California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case."
>
> "The action by the Supreme Court of Florida was arbitrary and capricious and should be reviewed by this Court."
>
> "The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near v. Minnesota, supra; Grosjean v. American Press Co., supra; DeJonge v. Oregon, supra; Herndon v. Lowry, supra; Lovell v. Griffin, supra; Cantwell v. Connecticut, supra; Bridges v. California, supra; Murdock v. Pennsylvania, supra."

These three points and the authorities cited by counsel for petitioners in support of them are dealt with so thoroughly and convincingly by Mr. Justice Terrell who wrote the opinion of the Supreme Court of Florida (R. 153-171), which of necessity will be read and studied by the Justices of the United States Supreme Court to whom this case is referred for preliminary investigation, that the counsel for respondent, in the interest of brevity and expedition, and to lighten the burden of study and consideration by this Honorable Court, desire to submit this opinion by reference to the record and as a part of this brief.

Point 1

The Decision of the Supreme Court of Florida in This Case Is in Conflict With the Decision of This Court in Bridges v. California, Supra, and With State Court and Federal Court Decisions Adhering to the Test Laid Down in the Bridges Case.

The Supreme Court of Florida recognized the *Bridges* case and stated:

> "We have examined the editorials and the telegram involved in the Bridges case and we find nothing in them assaulting the integrity of the court. They would not have been contemptuous under the rule in the Hayes case" (R. 166).
>
> *Pennekamp* v. *State*, 22 So. 2d (text) 884,

that:

> "Certainly the courts are *interests* which the state may lawfully protect" (italics supplied) (R. 167) (ibid),

and

> "A newspaper may criticize, harrass, irritate, or vent its spleen against a person who holds the office of judge in the same manner that it does a member of the Legislature and other elective officers, but it may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public" (R. 167) (ibid),

that:

> "It may also be confidently asserted that a free press is no freer than a free man, the one being as securely bound by approved canons of decency and propriety as the other. Neither is free to do as it will in total disregard of the right of others" (R. 168).
>
> *Pennekamp* v. *State*, 22 So. 2d (text) 885,

that:

> "We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be, the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect" (R. 171).
>
> *Ponnekamp* v. *State*, 22 So. 2d (text) 886.

POINT 2

The Action by the Supreme Court of Florida Was Arbitrary and Capricious and Should Be Reviewed by This Court

The citation charges that the editorial and cartoon libels the court by stating:

> "that the Judges of this Court therein acting (and this Court acting through them) have not fairly and impartially heard and decided the matters in said editorial mentioned and have thereby represented unto the general public that notwithstanding the great public trust vested in the Judges of this Court that they have not discharged their duties honorably and fairly in respect to said pending cases * * *" (R. 5).

When the contempt case came on for trial it was stated from the bench:

> "Judge Barns: * * * The respondents here have been brought to answer a charge that they made an unfair statement concerning the proceedings in court, and in turn have based criticism upon an unfair, untrue statement. It was considered not a full report, nor a fair report." (R. 57).

In ruling on the petitioners' motion to quash the trial court noted:

> "That the respondents have been cited on a charge of making an unfair and untrue report of court proceedings and in turn of making false imputations

against the court and its judges as such based upon respondents' own unfair and untrue report" (R. 128).

In applying the law to these facts the Florida Supreme Court held that:

> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness, or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment" (R. 166).
>
> *Pennekamp* v. *State*, 22 So. 2d (Text) 884,

and decided that:

> "We therefore hold that the cartoon and the editorial afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law" (R. 171).
>
> *Pennekamp* v. *State*, 22 So. 2d (text) 886.

Point 3

(Doctrine of Subsequent Punishment)

Petitioners' third ground for "Reasons Relied on for the Allowance of the Writ," like their third point in Argument, advances that abuse of the freedom of the press is not subject to *previous* restraint but that:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege," quoting
>
> *Near* v. *Minnesota*, 283 U. S. (text) 719.

At the trial the same argument was advanced by counsel for petitioner (R. 61; footnote R. 144).

Doubtless the trial judges traveled from the beginning on the assumption that this was the law. The trial court's ruling contained the following language:

> "Freedom of the press is the liberty to print and publish without any previous leave of governmental authority, subject always to the consequences of the law" (R. 133).

Petitioners' petition states:

> "This Court has held that subsequent punishment for such abuses as may exist in respect of comment upon the actions of public officials—including judges—is the appropriate remedy consistent with constitutional privilege.
>
> "This remedy was not invoked" (Pet. p. 22).

There was no prior restraint. Prior punishment was not imposed. Punishment has been imposed and it was subsequent. This principle has been advanced by petitioner to the trial court and it was adhered to by the trial court. Counsel still insist that it is sound but has not been invoked. It is sound law.

There was no prior restraint and the punishment was subsequent and by the exercise of an appropriate remedy for the protection of the State's institution in the discharge of its functions and duty.

Conclusion

It is respectfully contended on behalf of respondent that the petition for a writ of certiorari should be denied.

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